APPENDIX

PORTIONS OF TREATY OF VERSAILLES INCORPORATED IN TREATY BETWEEN THE UNITED STATES AND GERMANY AND RELEVANT TO THIS CASE

PART VIII

SECTION I

ARTICLE 243

The following shall be reckoned as credits to Germany in respect of her reparation obligations:

(*a*) Any final balance in favour of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe) and Sections III and IV of Part X (Economic Clauses) of the present Treaty;

(*b*) Amounts due to Germany in respect of transfers under Section IV (Saar Basin) of Part III (Political Clauses for Europe). Part IX (Financial Clauses), and Part XII (Ports, Waterways, and Railways);

(*c*) Amounts which in the judgment of the Reparation Commission should be credited to Germany on account of any other transfers under the present Treaty of property, rights, concessions, or other interests.

In no case, however, shall credit be given for property restored in accordance with Article 238 of the present Part.

* * * * *

PART X

* * * * *

SECTION III

DEBTS

ARTICLE 296

There shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties within three months of the notification referred to in paragraph (*e*) hereafter the following classes of pecuniary obligations:

(1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory;

(2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war;

(3) Interest which has accrued due before and during the war to a national of one of the Contracting Powers in respect of securities issued by an Opposing Power, provided that the payment of interest on such securities to the nationals of that Power or to neutrals has not been suspended during the war;

(4) Capital sums which have become payable before and during the war to nationals of one of the Contracting Powers in respect of securities

issued by one of the Opposing Powers provided that the payment of such capital sums to nationals of that Power or to neutrals has not been suspended during the war.

The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (*d*), and disposed of by them under the conditions provided by the said Section and Annex.

The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section:

(*a*) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices;

(*b*) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. Nevertheless, debts due by the inhabitants of territory invaded or occupied by the enemy before the Armistice will not be guaranteed by the States of which those territories form part;

(*c*) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor;

(*d*) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions, or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable-transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation);

(*e*) The provisions of this Article and of the Annex hereto shall not apply as between Germany on the one hand and any one of the Allied and

Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, on the other hand, unless within a period of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Germany by the Government of such Allied or Associated Power or of such Dominion or of India, as the case may be;

(*f*) The Allied and Associated Powers who have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and German nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

ANNEX

1. Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, paragraph (*e*), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing Office in their respective districts, except that all transactions with the Clearing Office in the Opposing State must be effected through the central Clearing Office.

2. In this Annex the pecuniary obligations referred to in the first paragraph of Article 296 are described "as enemy debts," the persons from whom the same are due as "enemy debtors," the persons to whom they are due as "enemy creditors," the Clearing Office in the country of the creditor is called the "Creditor Clearing Office," and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office."

3. The High Contracting Parties will subject contraventions if paragraph (*a*) of Article 296 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

4. The Government guarantee specified in paragraph (*b*) of Article 296 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

5. Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will in due course inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case the Debtor Clearing Office will give the grounds for the nonadmission of debt.

6. When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

7. The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the Creditor Clearing

Office notice has been given by the Debtor Clearing Office that it is not admitted.

8. When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

9. The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses, or commissions.

10. Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, interest at 5 per cent on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claim shall have been disallowed or the debt paid.

Each Clearing Office shall, in so far as it is concerned, take steps to collect the fines above provided for, and will be responsible if such fines can not be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

11. The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the Allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

12. To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

13. Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

14. In conformity with Article 296, paragraph (*b*), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid.

15. Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.

16. Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration, if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

17. Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

18. Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to reopen and maintain a claim abandoned by the same.

19. The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the informa-

tion and documents in their possession, so as to enable the Tribunal to decide rapidly on the cases which are brought before it.

20. Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit.

A fee of 5 per cent of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

21. With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned.

Each of the Clearing Offices will be at liberty to correspond with the other and to forward documents in its own language.

22. Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent per annum, except in cases where by contract, law, or custom the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.

23. Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 296, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

24. The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals.

25. In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

SECTION IV

PROPERTY, RIGHTS, AND INTERESTS

ARTICLE 297

The question of private property, rights, and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

(*a*) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights, and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights, and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

(*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and

interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

(*c*) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (*b*) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(*d*) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(*e*) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their

property, rights, or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

(*f*) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (*e*) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph can not be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (*e*) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights, or interests of which he was deprived.

Through restitution in accordance with this Article the price or the amount of compensation fixed by the application of paragraph (*e*) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(*g*) The rights conferred by paragraph (*f*) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights, or interests were not applied before the signature of the Armistice.

(*h*) Except in cases where, by application of paragraph (*f*), restitutions in specie have been made, the net proceeds of sales of enemy property, rights, or interests, wherever situated, carried out either by virtue of war legislation or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in

favor of Germany resulting therefrom shall be dealt with as provided in Article 243.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests and the cash assets of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests and the cash assets of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests, or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly preju-

dicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(*i*) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States.

(*j*) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights, and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights, or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty shall be restored to the owners.

ARTICLE 298

Germany undertakes, with regard to the property, rights, and interests, including companies and associations in which they were interested, restored to nationals of Allied and Associated Powers in accordance with the provisions of Article 297, paragraph (*a*) or (*f*):

(*a*) to restore and maintain, except as expressly provided in the present Treaty, the property, rights, and interests of the nationals of Allied or Associated Powers in the legal position obtaining in respect of the property, rights, and interests of German nationals under the laws in force before the war;

(*b*) not to subject the property, rights, or interests of the nationals of the Allied or Associated Powers to any measures in derogation of

property rights which are not applied equally to the property, rights, and interests of German nationals, and to pay adequate compensation in the event of the application of these measures.

ANNEX

1. In accordance with the provisions of Article 297, paragraph (*d*), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions, or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision, or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights, or interests dealt with in pursuance of any such order, direction, decision, or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights, or interests, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the

Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above-mentioned measures as have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void.

2. No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power.

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken

hereafter with regard to enemy property and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4. All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associa-

by its nationals and relating to property, rights, or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

Germany will at any time on demand of any Allied or Associated Power furnish such information as may be required with regard to the property, rights, and interests of German nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights, or interests effected since July 1, 1914.

11. The expression "cash assets" includes all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

12. All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

Within one month from the coming into force of the present Treaty, or on demand at any time,

Germany will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within German territory and which concern the property, rights, and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents and for their accuracy.

14. The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force

of the present Treaty notify Germany that the said provisions are not to be applied.

15. The provisions of Article 297 and this Annex apply to industrial, literary, and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies, or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (*b*).

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925.

FREDERICK C. HICKS, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States,

Petitioners,

v.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al., etc.*

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al., etc.,*

Petitioners,

v.

FREDERICK C. HICKS, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and CARL JOESGER, *et al., etc.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al.*, CONSTITUTING THE FIRM OF LADENBURG, THALMANN & CO.

Alexander B. Siegel

Rae Printing Post Job Printing Office, Inc., 304 Pulton St., New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1925

FREDERICK C. HICKS (substituted for Thomas Woodnutt Miller), as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, Petitioners,

vs.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al.*, ETC.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, *et al.*, ETC., Petitioners,

vs.

FREDERICK C. HICKS (substituted for Thomas Woodnutt Miller), as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and CARL JOERGER, *et al.*, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., CONSTITUTING THE FIRM OF LADENBURG, THALMANN & CO., PETITIONERS AND RESPONDENTS.

Report of Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported under the title of *Guinness* v. *Miller*, 299 Fed. 538; the opinion of the

United States District Court for the Southern District of New York is reported under the title of *Guinness* v. *Miller,* 291 Fed. 768, 769.

The Jurisdiction of this Court.

The judgment to be reviewed is a final judgment of the United States Circuit Court of Appeals, dated April 21, 1924, affirming the decree of the United States District Court for the Southern District of New York (R. 27).

The cause is in the Supreme Court by virtue of writs of certiorari granted on June 9, 1924, upon the petitions, respectively, of the plaintiffs below, and of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.*

Since the granting of these writs of certiorari Thomas W. Miller ceased to be Alien Property Custodian, and by order of this Court, dated May 25, 1925, Frederick C. Hicks, as Alien Property Custodian, was substituted in his place as a party in these causes.

The statutory provisions under which the jurisdiction of the Supreme Court is invoked are found in Section 240 of the Judicial Code as it stood on June 8, 1924 (36 Stat. L. 1157).

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* As each of the parties below applied for a writ of certiorari, and each are both petitioners and respondents, the plaintiffs in the District Court will for clarity be referred to in this brief as plaintiffs.

Statement of the Case.

At the time of the commencement of the suit and for many years prior thereto, the plaintiffs and their predecessors, constituting the firm of Ladenburg, Thalmann & Co., were bankers in the Borough of Manhattan, City of New York (R. 8). For many years prior to April 6, 1917, the defendants constituting the firm of Delbrück, Schickler & Co., who made no appearance either in the United States District Court or in the Circuit Court of Appeals, were engaged in transactions with the firm of Ladenburg, Thalmann & Co., and on April 6, 1917 were indebted to the firm of Ladenburg, Thalmann & Co., in the sum of Marks 1,079.35, as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the defendants Delbrück, Schickler & Co., and thereafter there were no dealings between the plaintiffs and the said defendants, Delbrück, Schickler & Co. (R. 9).

The plaintiffs duly filed a notice of claim against the defendants, Delbrück, Schickler & Co., with Alien Property Custodian as prescribed in the Trading with the Enemy Act (Act of October 6, 1917, ch. 106, 40 Stat. L. 419), claiming an indebtedness of Marks 1,079.35, as of January 1, 1916, converted into dollars at the pre-war rate of exchange, at the rate of 17½ cents per Mark, the said pre-war rate of exchange being the average rate of exchange prevailing for one month prior to April 6, 1917, the date of the commencement of the war between the United States and Germany (R. 8, 9), and conceded a separate indebtedness to the defendant, Delbrück, Schickler & Co., of $35.35 (R. 9).

The value of the Mark on December 31, 1916 was 18¼ cents (R. 9).

The defendants Alien Property Custodian and Treasurer of the United States have seized sufficient moneys of the defendants, Delbrück, Schickler & Co., to pay the claim of the plaintiffs (R. 9).

Valuing the Mark at the rate of exchange of 17½ cents per Mark, the claim of the plaintiffs against the defendants, Delbrück, Schickler & Co., as of April 6, 1917, after allowing an offset of $43.95 was $148.28 (R. 9).

The United States District Court for the Southern District of New York in its final decree dated July 17, 1923, allowed the claim in the sum of $183.10 with interest from May 23, 1923 (R. 13), which resulted in an allowance of interest on the claim from July 14, 1919 (R. 9), thus excluding interest for the period from April 6, 1917, the date of the commencement of the war, to July 14, 1919, the date when commercial transactions with German subjects was permitted under license from the President (R. 10).

At the date of the trial, May 23, 1923, the value of the Mark was 2/1000 of a cent, and on July 17, 1925, the date of the decree, the value of the Mark was 1/25000 of a cent (R. 9, 10).

The judgment was entered for the payment of a sum based on the valuation of the Mark at 17½ cents per Mark (R. 10).

If interest had been allowed for the period between April 6, 1917 and July 14, 1919, the decree would have provided for the payment of $203.60 in lieu of $183.10 with interest from May 23, 1923 (R. 9).

If the value of a Mark were taken at 1/2000 of a cent, as at the date of trial, or 1/25000 of a cent,

as at the date of judgment, then, since the original debt was for 1,079.35 Marks, the complaint would have had to be dismissed, because on each of these dates the debt would have dwindled to a value of less than one cent.

Assignment of Errors.

Only two questions arise in this case.

The first is raised by the assignment of errors submitted by the plaintiffs, to the effect that it was erroneous for the United States District Court to refuse the recovery of interest upon the claim in question from April 6, 1917 to July 14, 1919 (R. 15).

The second is raised by the assignment of errors of the defendants, Alien Property Custodian and Treasurer of the United States, to the effect that it was erroneous to give judgment for the plaintiffs based upon a value of the Mark as of the date when the account between the parties was stated, or as of any date other than the date of the judgment (R. 14), the acceptance of this position requiring a dismissal of the complaint (R. 14).

It may be noted here that the third assignment of errors of the defendants, Alien Property Custodian and Treasurer of the United States, referring to the statement of an account between the plaintiffs and the defendants, Delbrück, Schickler & Co., on *December 16, 1917*, finds no basis in the statement of evidence (R. 8-10), or in the pleadings (R. 1-4, R. 6-8), and is based solely on an inadvertent statement in the opinion of Judge Learned Hand (R. 11). Of course, there could have been no statement of the account on December 16, 1917, in the midst of the war.

Argument.

The plaintiffs submit that in an action brought under Section 9 of the Trading with the Enemy Act to recover from the Alien Property Custodian and Treasurer of the United States, out of the property of an alien enemy seized by them under the provisions of the Trading with the Enemy Act, a debt owing to the plaintiffs by the alien enemy, the plaintiffs are entitled to recover not only the principal of the debt, but also interest thereon, from the date of the inception of the debt.

This proposition is not controverted by the Alien Property Custodian and by the Treasurer of the United States, except to the extent that they contend that such interest is not allowable during the period that commercial communication between the United States and Germany was interdicted, that is, between April 6, 1917, and July 14, 1919. Plaintiffs, on the other hand, contend that such an artificial hiatus does not exist, particularly where the debt was of a character which was drawing interest prior to April 6, 1917. This contention is sustained on two grounds: *First,* that whatever might be the rule in an action brought by them to recover a personal judgment against the alien enemy, such an exception as to the time when interest shall run cannot apply in an action brought against the Alien Property Custodian and Treasurer of the United States under the Trading with the Enemy Act merely to have property of the alien enemy seized by them applied to the payment of the debt; and *Secondly,* that by virtue of the Treaty of Peace between the United States and Germany,

such interest is expressly to be allowed in the character of action here instituted by the plaintiffs against the Alien Property Custodian and Treasurer of the United States.

Plaintiffs also contend, and in this contention they have been upheld by the District Court and the Circuit Court of Appeals, that they are entitled to recover the true value of the debt from the alien enemy to them as of the date of its inception, or as of the date of the beginning of the war. This contention they sustain also, *First,* by reason of the provisions of the Trading with the Enemy Act as interpreted in the light of the Common Law, and *Secondly,* because the Treaty of Peace between Germany and the United States expressly provides that in an action such as this the plaintiffs shall be entitled to recover the true value of the debt as of a date prior to the institution of hostilities.

The question of the allowance of interest will be considered first, because upon that question the plaintiffs have been unsuccessful below.

POINT I.

In an action brought for the recovery of a debt under the Trading with the Enemy Act, out of property of the alien enemy seized by the Alien Property Custodian, and which has borne interest prior to April 6, 1917, interest is allowable for the whole period subsequent to April 6, 1917.

(A)

Apart from Treaty Provisions.

This action is brought under Section 9 (*a*) of the Trading with the Enemy Act, as amended (Act of June 5, 1920, ch. 241, 41 Stat. L. 977), which reads as follows:

> "Sec. 9 (*a*) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien

Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

This Section 9 (*a*) has since the institution of this suit been amended by Act of March 4, 1923, ch. 285, 42 Stat. L. 1511, but only by omitting therefrom the provision that "suit is to be instituted at any time before the expiration of six months after the end of the war"; thus removing the statute of limitations, and in no way altering the substance of the provisions of the statute under which this suit was instituted. The amended statute in force at the time when this suit was instituted was identical in all respects material to this controversy with the Section 9 as originally enacted (Act of October 6, 1917, ch. 106, 40 Stat. L. 419).

We shall later have occasion to refer to the conflict, or perhaps the confusion of authority on the subject of the allowance of interest on a debt between nationals of belligerent countries during the period of war, where a common law action is brought after the conclusion of hostilities for a recovery of the debt; but these cases are clearly not direct authorities upon the question of the allowance of interest where the suit is brought *not at Common Law to recover a personal judgment,* but under the provisions of a statute relating to the disbursement of funds to the creditors of alien enemies whose property has been seized by the Government.

This question has once arisen in this Court in the case of *Miller* v. *Robertson,* 266 U. S. 243. In that case this Court permitted interest to be recovered for the whole period of the war. The facts in that case were, as we shall point out, indistinguishable in principle from the facts in this. By reason of the importance of the pronouncement,

we shall before comparing the facts quote fully what was said in that case by this Court in the opinion rendered by MR. JUSTICE BUTLER at pages 256-259:

> "The district court allowed interest from July 3, 1919; the circuit court of appeals from June 29, 1916. Appellants object on the ground that this is a suit against the United States, and interest is not allowable against it; that at common law interest was not recoverable, and the case was not a proper one for the exercise of chancery discretion; and that, if it was not an abuse of discretion to allow interest from the date when the war was practically ended, its allowance from June 29, 1916, was erroneous. In an attempt to commence an action in Utah against the buyers to recover damages resulting from their breach, the seller, on June 29, 1916, served a summons and complaint on the representatives of the buyers. On the facts found, which need not be repeated here, the circuit court of appeals (286 Fed. 511) rightly held the attempted service to amount to a demand, and that interest might be allowed from that date. See *Goddard* v. *Foster*, 17 Wall. 123, 143; *Kaufman* v. *Tredway*, 195 U. S. 271, 273; *United States* v. *Poulson*, 30 Fed. 231; *Dwyer* v. *United States*, 93 Fed. 616; *Mather* v. *Stokely*, 218 Fed. 764, 767.
>
> "While the suit, as held in *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603 (affirming 289 Fed. 924), is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest (Judicial Code, Sec. 177; *National Volunteer Home* v. *Parrish*, 229 U. S. 494; *United States* v. *North American Co.*, 253 U. S. 330, 336; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304) does not apply.

"Compensation is a fundamental principle of damages, whether the action is in contract or in tort. *Wicker* v. *Hoppock*, 6 Wall. 94, 99. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis* v. *Innerarity*, 6 How. 146, 154. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding* v. *Mason*, 161 U. S. 375, 396. Generally, interest is not allowed upon unliquidated damages. *Mowry* v. *Whitney*, 14 Wall. 620, 653. But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion, may include interest or its equivalent as an element of damages. See *Bernhard* v. *Rochester German Insurance Co.* 79 Conn. 388, 397; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126; *Faber* v. *City of New York*, 222 N. Y. 255, 262; *De la Rama* v. *De la Rama*, 241 U. S. 154, 159, 160; *The Paquete Habana*, 189 U. S. 453, 467; *Eddy* v. *Lafayette*, 163 U. S. 456, 467; *Demotte* v. *Whybrow*, 263 Fed. 366, 368.

"In this case, at least as early as June 29, 1916, the date of demand, the seller was entitled to have from the buyers the difference between the sum which it would have received prior to that date, if the buyers had kept their contract, and the amount it received on resale. Payment in 1924 or later of that sum is not full compensation. *Cf. Seaboard Air Line Ry. Co.* v. *United States*, *supra*, 306. All damages had accrued prior to the demand. There was nothing dependent on any future event. The elements necessary to a calculation of the amount the seller was then entitled to have to make it whole—namely, the quantities of ore

produced, its metallic content, the prices to be paid by the buyers under the contract, and the amount realized on resale—were known or ascertainable. Our entrance into the war was long subsequent to June 29, 1916, the date of the demand. General representatives, who had long been in charge of the business in this country of Beer, Sondheimer & Company, remained here until after that event. At all times until it was taken over under the act, they had money and property of that firm more than sufficient to make good the seller's damages. It would be unjust and inconsistent with the remedial purposes of § 9 to hold that the seized enemy property cannot be held for the full amount of the seller's loss, and that, to the extent of interest during the period of the war, compensation must be denied. The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war, cannot be sustained. *Cf. Ward* v. *Smith,* 7 Wall. 447, 452; *Conn.* v. *Penn.* 6 Fed. Cas. No. 3, 104, pp. 282, 291; *Yeaton* v. *Berney,* 62 Ill. 61, 63; *Gates* v. *Union Bank,* 12 Heisk (Tenn.), 325, 330."

In that case the suit was brought for damages for breach of contract, and it was held that the damages were of such a character that their amount could be calculated with certainty, and that interest was consequently allowable and ran from the date of the breach.

In the case at bar the action is upon a stated account, and interest ran, of course, from the date as of which the account was stated (*Young* v. *Godbe,* 15 Wall. 562). Thus far there is no distinction between the cases, or if there be any, the case at bar is more clearly favorable to the allowance of interest.

In *Miller* v. *Robertson*, *supra*, the agent of the alien enemy had moneys belonging to the alien enemy in this country. This agent, however, had no authority to pay the claim of Robertson; and on the contrary, under the instructions of his principal the claim of Robertson was resisted as an unjust one. Having no authority to pay the claim, the agent had, of course, no authority to pay the interest which became due as damages for non-payment of the claim.

In this case it also appears that the German debtor had property in the United States sufficient to pay the claim, because such property was seized by the Alien Property Custodian (R. 9); but, it does not appear whether it was an agent of the alien enemy who held the property belonging to the alien enemy in this country, or whether the persons who held the property seized by the Alien Property Custodian were simply depositaries or debtors.

It seems obvious that whether interest is recoverable for the period of the war in an action brought against the Alien Property Custodian under Section 9(*a*) of the Trading with the Enemy Act cannot depend upon whether the property seized by the Alien Property Custodian was held by an agent of the alien enemy who was *not* authorized to pay either the principal or the interest of the claimed indebtedness, or whether it was held by a simple depositary or by a debtor who was equally unauthorized to make such payment.

If it had appeared in *Miller* v. *Robertson*, *supra*, that the agent of the alien enemy was authorized to pay the debt, and the interest too, and had not paid it, then there would be indeed a distinction in the facts between that case and the case at bar,

and it might be argued whether such a distinction ought to make a difference in the result.

Since, however, the agent of the alien enemy in *Miller* v. *Robertson, supra*, was not an agent to pay, but an agent to *refuse* payment, there is not even a distinction. The agent in that case, while an agent for other purposes, was, so far as concerns the payment of the debt to Robertson, just as much and no less merely a depositary for the alien principal or a debtor to his alien principal, as the persons from whom the Alien Property Custodian seized the property of Delbrück, Schickler & Co., which is to be applied to the payment of the plaintiffs' debt, were merely depositaries of or debtors to Delbrück, Schickler & Co.

The case of *Miller* v. *Robertson, supra*, is, therefore, a direct authority in favor of the proposition that, in an action such as this, interest should have been allowed from the period from April 6, 1917 to July 14, 1919, as well as for the periods prior and subsequent thereto.

But if the case of *Miller* v. *Robertson, supra*, be deemed not a direct decision in favor of our contention, then we submit that an examination of the authorities will lead, contrary to the view of the learned District Judge, who was inclined to take our view if the matter had been deemed by him to be *res nova* (R. 10), to the same conclusion.

So far as our research has disclosed, there are only three decisions on the question of interest to be allowed during war upon debts owing by a citizen of one belligerent country to a citizen of another, that are binding in this Court. We summarize their holdings as follows:

(1) Where an action is brought to recover a personal judgment upon a debt from a citizen of one belligerent to a citizen of another which fell due

at a time when war was waging, *and had not borne interest, by its terms, prior to the time of maturity*, interest may not be recovered for the period prior to the cessation of hostilities. *Brown* v. *Hiatts*, 15 Wall. 177.

(2) In the event, however, that upon the falling due of such a debt during the period of war, the enemy *creditor* has an agent in the country of the debtor to receive payment of the debt, interest will run if the payment is not made. The war is not deemed to terminate the agency established by the enemy creditor for the purpose of receiving payment of the debt. *Ward* v. *Smith*, 7 Wall. 447.

(3) In the event that the enemy *debtor* has property in the hands of an agent in the country of the creditor *even though the agent has no authority to devote it to the payment of the debt, and is under instructions from his principal not to do so*, interest will continue to run. *Miller* v. *Robertson*, 266 U. S. 243.

To which of these situations is the present case, *where the enemy debtor has property in this country sufficient to pay the debt*, more analogous?. It is a question that seems to answer itself, and the answer is confirmed as the logical result of collateral doctrines of law.

It should be remembered that an enemy national, while he may not bring suit in the courts of this country during the pendency of war, *is at all times subject to having suit brought against him*, if jurisdiction can be obtained. This is well settled law, both here and in England.

McVeigh v. *United States*, 11 Wallace 259, by SWAYNE, *J.*, at page 267 (italics ours):

> "Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; be-

> cause, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country (*Clarke* v. *Morey*, 10 Johnson 69; *Russel* v. *Skipwith*, 6 Binney 241), *it is clear that he is liable to be sued*, and this carries with it the right to use all the means and appliances of defense. In Bacon's Abridgment (Title Alien D; see also Story's Equity Pleading, § 53; *Albrecht* v. *Sussman*, 2 Vesey & Beans, 326; *Dorsey* v. *Kyle et al.*, 30 Maryland, 512, 522), it is said: '*For as an alien may be sued at law*, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery.'"

Robinson & Co. v. *Continental Insurance Co. of Mannheim* [1915], 1 K. B. 155, by BAILHACHE, *J.*, at page 161:

> "I have come to the conclusion that there is no rule of common law which suspends an action in which an alien enemy is defendant, and no rule of common law which prevents his appearing and conducting his defense."

There are two ways in which an action could be instituted against an alien enemy; the one, by personal service, and the other, by an attachment against his property. Personal service in this case would have been impracticable; but since the alien enemy had property in this country sufficient to pay the debt the action could have been maintained by the issuance of an attachment, garnishment or similar trustee process. This possibility existed from April 6, 1917, until the property was seized by the Alien Property Custodian, probably some considerable period of time after October 6, 1917; and the Alien Property Custodian concedes that after he

seized the property he, or the President, had the right, although not the obligation, of paying the debt owing to plaintiffs. We respectfully submit *that it results from the fact that an action might have been maintained for the recovery of the debt,* that interest continued to run.

That is to say, the decisions in this Court seem to support the following distinction, that where an action may be maintained for the recovery of a debt *quasi in rem* so that the question of personal obligation is not involved, then interest may be recovered for the period of the war; but where the action is purely *in personam* based upon the breach of a personal obligation to pay, then the impossibility of payment may be a defense to the claim for interest. An action under Section 9 of the Trading with the Enemy Act is purely *in rem,* as it binds only the property of the alien enemy seized by the Alien Property Custodian; and since under the terms of Section 9, the debt may be paid out of that property, even during the continuance of the war, there is no reason why interest, as an incident of the debt, should not likewise be so paid. It is to be noted that Section 9 of the Trading with the Enemy Act substantially in its present form, was enacted as early as October 6, 1917 (ch. 106, 40 Stat. L. 419).

It may be of value to examine the English Law on the subject, and compare it with the mass of American decisions as developed in the courts of the various states. There is no confusion on the subject in English Law.

Hugh Stevenson & Sons, Limited, v. *Aktiengesellschaft für Cartonnagen-Industrie* [1917] 1 K. B. 842, by SWINFEN EADY, *L. J.*, at page 850:

> "A debt which by law carries interest, and which is owing to an enemy, does not cease to

carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned Judge below said: 'Enemy property in this country is not to be confiscated'; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy he would certainly have claimed interest. In *Wolff* v. *Oxholm* (1817), 6 M. & S. 92, the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favor of an enemy during the war, although not then actually payable to him."

This was decided by the Court of Appeal with one dissenting Lord Justice, and was appealed to the House of Lords, where the decision was unanimously affirmed.

Hugh Stevenson & Sons v. *Aktiengesellschaft für Cartonnagen-Industrie* [1918], A. C. 239, by *Lord Chancellor* FINDLAY at page 245:

"This appears to me to follow from the principle that the property of an enemy is not confiscated though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest, no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare* v. *Allen*, 2 Dall. 102, and *Brown* v. *Hiatts*, 15 Wall. 177, the latter a decision of the Supreme Court of the United States.

"These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have

> formed the subject of any express decisions in England. The judgment of Lord Ellenborough, however, in *Wolff* v. *Oxholm*, 6 M. & S. 92, appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."

It seems to us that the English decisions state the sound rule in the most general terms, and we have carefully examined the American decisions to get a hint, if we could, of the reason for the contradictory results which seem to obtain. We can find only a historical explanation, which we respectfully submit to the Court:

The cases first arose after the American Revolution. The creditors, of course, were always English; the debtors were the victorious but impoverished Americans. Is it to be wondered at that cases were then decided to the effect that the American debtor should not be obliged to pay interest to the English creditor during the seven year period that England was seeking to suppress and obliterate the new American nation? Such decisions were rendered in *Hoare* v. *Allen*, 2 Dall. 102; *Foxcraft* v. *Nagle*, 2 Dall. 132, and in *Conn* v. *Penn*, Peters Circuit Court 496.

There were cases, however, on the other side. The South Carolina Court decided that the English creditor was entitled to interest in *Neilson* v. *Rutledge*, 1 Dessauss. Eq. 194, and referred to an apparently unreported decision of the Chief Justice of the United States Supreme Court sitting at Circuit in Connecticut to the same effect.

The next and only other time when this question became urgent in the history of this country was after the Civil War, when northern creditors pursued southern debtors. The first case which came up to be decided was in the United States Circuit Court in North Carolina in which Chief Justice CHASE rendered the opinion. This case, by order of the Supreme Court of the State of North Carolina (undoubtedly at that time a Carpet-Bag Court), is reported in the North Carolina reports as *Shortridge* v. *Macon*, 61 N. C. 392. In that case Chief Justice CHASE held that interest was payable by the southern debtor to the northern creditor, because, irrespective of whether interest was payable for the period of a war, and he conceded that it would not be, undoubtedly to make his argument stronger, yet the Southerners had not been engaged in war, but in *treason*, and the treasonable citizen and rebel to the Union could not assert his treason as an excuse for not paying his debt with interest to the loyal citizen.

It was not to be expected that this doctrine would be accepted by the courts of the southern states in which the northern creditors sued to recover their debts. Nor was it to be expected that this inflammatory opinion of Chief Justice CHASE would be followed when the common sense and equity and fairness of the country realized that if the United States were to be truly united, the Confederates must not be looked upon as traitors, and must be accorded the rights of vanquished belligerents on the one hand, and treated as equal citizens of the United States on the other.

In the many cases decided in the south, therefore, the southern case of *Neilson* v. *Rutledge*, *supra*, decided after the revolutionary war is never once

mentioned; but they all refer to the northern case of *Conn* v. *Penn*, *supra*, decided in the Pennsylvania United States Circuit Court by Mr. Justice WASHINGTON, whose name was enough to establish its authority. It may be noted parenthetically that all the post-revolutionary cases denying interest, which are now referred to as leading cases, were decided in the single State of Pennsylvania. These southern cases which refuse to follow the post-revolutionary *southern* case of *Neilson* v. *Rutledge*, *supra*, and follow the post-revolutionary *northern* case of *Conn* v. *Penn*, *supra*, are:

Mayer v. *Reed & Co.*, 37 Georgia 482;
McGaughy, Parker & Co. v. *Leon Berg & Co.*, 4 Heisk., 695;
Pillow v. *Brown & Childress*, 26 Ark. 240;
Brewer v. *Hastie & Co.*, 3 Call. 22;
McVeigh v. *The Bank of the Old Dominion*, 26 Gratt. 188;
Walker v. *Beauchler*, 27 Gratt. 511;
Fred v. *Dixon*, 27 Gratt. 541;
Selden v. *Preston*, 11 Bush. 191.

The state courts in the north, when northern creditors could get hold of their southern debtors to subject them to the jurisdiction of *northern* courts, decided differently.

Lash v. *Lambert*, 15 Minn. 416 by RIPLEY, *Ch. J.*, p. 424:

> "But in the case of *Shortridge* v. *Mason*, in the U. S. Circuit Court for North Carolina, 2 *Am. Law Rev.* p. 95, Chase, *C. J.*, held that these cases were inapplicable to the case of a debt due from a citizen of North Carolina to a citizen of Pennsylvania, and that interest thereon was not suspended during the rebellion. This was obviously correct, for it was the treason of

the rebel, that brought about the prohibition of intercourse that followed upon the outbreak of the rebellion.

"To claim exemption from the payment of interest on the ground, that he was not in default in not paying, because the law had prevented him from so doing, would be, to take advantage of his own wrong. *Harper et al.* v. *Ely, Cook Co., Ill. Circuit Court, July 26, 1870. Reported Chicago Legal News of July 30, 1870.* Nevertheless, we think the principle on which the cases first referred to are based would be applicable to the case of debts due from citizens of the United States, to citizens of the rebel states.

"It was no fault of loyal citizens, that all intercourse became unlawful between themselves and the rebels; that all such was prohibited by positive law. (*See Act of Congress, July 13, 1861.*) In the words of the case last cited, 'numberless cases can be found which assert that laches during war will not be imputed by any state to its own loyal citizens.'"

Yeaton v. *Berney*, 62 Ill. 61.

To these northern cases may be added the case of *Spencer* v. *Brower*, 32 Texas 663, which decided that interest ran against a southern debtor in favor of the northern creditor, following the reasoning of *Shortridge* v. *Macon*, *supra*, and we think that the tenor of the opinion sufficiently indicates that the Texas Court at that time was a "Carpet-Bag" court.

With the change in sentiment toward the south which later came about, the Supreme Court in *Brown* v. *Hiatt*, 15 Wall. 177, in a case where the debt did not become payable until after the war began, and *was drawing no interest before the war began*, stated that interest did not run during the war.

We have now traced the history of what seems to us to be the utterly illogical dogma, unrecognized in the Common Law as interpreted in England, that the payment of interest is not only suspended during the period of the war, when the principal also may not be paid, but may also not be recovered after the war is over at the time when the principal must be paid. This doctrine is not even logically applied. No one has yet claimed that the interest represented by a coupon on a corporate bond is not ultimately payable simply because the holder of that coupon is an alien enemy. As a matter of fact, the Alien Property Custodian has always insisted, and now insists, and we think with perfect propriety, that such coupon is payable, that the obligation which it represents is not nullified simply because the holder of it happens to be an alien enemy, and he insists upon collecting it and does collect it. Whether the claim for interest, which has come into being and was running prior to the commencement of the war, is represented by a physical piece of paper, or not, would seem to us to be utterly immaterial.

It may be observed that in none of the cases which decided that interest was not allowed was it decided that this result would occur if the enemy debtor had property in this country during the war which could be used in payment of the debt. Even if the confused mass of American decisions (which the note-writer in L. R. A. 1917-C, 672 has so hard a time in distinguishing from one another on their facts when the decisions are contradictory) will not allow this Court to assert the simple and just rule adhered to as the common law rule in England, all analogies in those decisions, and the logical result of the rule established by this Court that an enemy alien may be sued during

war, require the allowance of interest where the alien debtor had property in this country available for the payment of the debt.

As lending some color to this distinction we may refer to the cases which hold that interest may be recovered from a surety of an alien enemy debtor even during the period of the war.

Bean v. *Chapman*, 62 Ala. 58: In an action by the maker against the surety on a note, it was held that while the maker and payee were alien enemies, nevertheless, interest could be recovered for the period of the war against the surety, who throughout the war was on the Confederate side of the lines.

By Stone, *J.*, at page 64:

> "The plaintiff and defendants in this suit, at no time sustained the relation of alien enemies to each other. During the entire prevalence of that fierce conflict, they inhabited coterminous counties in this State. The plaintiff could at any time have received payment from defendants, and the defendants could at any time have paid the plaintiff without violating any rule of law. * * * At any time suit could have been prosecuted on this action between these parties, and the money due, with interest, might have been coerced out of these defendants, even before the close of the war. The case of *Paul* v. *Christie*, 4 Har. & McH. 161, is not distinguishable from this. It was there held that the plaintiff was entitled to full interest, notwithstanding the war. In such case the principal's defense is personal and does not affect or impair the surety's liability."

In *Dean* v. *Christie*, 4 H. & McH. (Maryland) 161, a British principal and an American surety executed a bond to the plaintiff, an American resident in Maryland. It was held that the payee might recover interest accruing during the Revolutionary War.

(B)

Under the Treaty Provisions.

To clarify our discussion, it may be as well to state in advance not only what we do claim, but also what we do not claim to be the effect of the provisions of the Treaty of Peace between Germany and the United States (Treaty Series No. 658).

We do *not* claim that the Treaty of Peace with Germany provides generally that upon claims of nationals of the United States against nationals of Germany there shall be allowed interest for the period of the war.

We do *not* claim that there is any provision of the Treaty of Peace with Germany which treats specifically or inferentially with the general subject of the allowance of interest for the period of the war upon claims of American nationals against German Nationals.

We *do* claim that the Treaty of Peace with Germany prescribes specifically that when the American Government in accordance with its own law pays the claims of German nationals out of the property of German nationals seized by it, then those claims shall be paid with interest for the period of the war.

In other words, in actions brought under Section 9 of the Trading with the Enemy Act, or in the case of voluntary payments by order of the President under Section 9 of the Trading with the Enemy Act, in respect of claims of American citizens for the payment of debts owing to them by German nationals out of their property seized by the Alien Property Custodian, interest is to be allowed for the period of the war.

The Treaty of Peace with Germany was made pursuant to the joint resolution with Congress embodied in Act of July 2, 1921 (42 Stat. L. 105), the relevant portions of which are as follows:

> "That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.
>
> "Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

The Treaty of Peace with Germany, of which ratifications were exchanged on November 11th, 1921, and which was proclaimed on November 14th, 1921, after reciting the above quoted provision of the Act of Congress, contains the following:

> ARTICLE I.
>
> Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the afore-

said Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions." (Treaty Series No. 658, p. 5.)

The attention of the Court is respectfully invited also to the Resolutions of the Senate of the United States of October 18, 1921 (61 Congressional Record 6438, First Session, 67th Congress)—two-thirds of the senators present concurring therein—by which the Senate gave its advice and consent to the ratification of this treaty, subject to the understanding, made a part of the Resolution of Ratification

"That the rights and advantages which the United States is entitled to have and enjoy under this Treaty embraced the rights and advantages of nationals of the United States

specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this treaty refers."

The effect of the Treaty of Peace with Germany is that the United States and its citizens are entitled to have and enjoy all the rights and advantages defined in those parts of the Treaty of Versailles specified in the Treaty of Peace with Germany, which are for that purpose incorporated into our own Treaty of Peace with Germany, and which accordingly have the force of law (Authorities *infra*, pp. 36-41).

Part X of the Treaty of Versailles (Senate Document No. 49, First Session, 66th Congress) incorporated into our Treaty of Peace with Germany (Article II, *supra*, p. 28) contains the sections establishing the right of an American citizen, in an action such as this, to recover interest on his claim for the period of the war.

It is called "Economic Clauses" and Section III thereof entitled "Debts", and Section IV thereof entitled "Property, Rights and Interests" contain the relevant provisions. A copy of these Sections is annexed to the brief as the Appendix.

Broadly speaking, two methods of payment of debts are prescribed in the Treaty: *First*, by the establishment of an International Clearing Office, in which event the Power adhering to the International Clearing Office surrenders the property of German nationals seized by it during the war to the control of the International Clearing Office; and *Secondly* by the autonomous action of a Power not adhering to the International Clearing Office, in which case it may retain the property seized by it for disposal in accordance with its own laws.

The first method is provided by Section III em-

bracing Article 296, and the Annex thereto, and comes into effect only in case a Power gives notice to Germany within one month after the ratification of the Treaty of Peace that it desires to join in the establishment of an International Clearing Office. (sub-division (*e*) of Article 296). This the United States has not done and it has consequently retained autonomy with respect to the disposition of the property of German nationals seized during the war.

Section IV, however, conferring or confirming this autonomy, does prescribe that in such case the nationals of the Power which retains this autonomy shall have none the less certain rights and advantages which they would have if the Power had joined in the establishment of an International Clearing Office (Treaty of Versailles, Annex to Section IV of Part X, Sub-division 14, *infra*, p. 32); and those rights and advantages belong, therefore, to citizens of the United States (Treaty of Peace, Article II, *supra*, p. 28).

Among these rights so stipulated is that when any Power pays debts of German nationals to its own nationals out of funds seized by it during the war, then those debts are to be paid with interest for the period of the war (Treaty of Versailles, Annex to Section III of Part X, Subdivision 22, *infra*, p. 33).

The Circuit Court of Appeals came to the conclusion that Section IV of Part X of the Treaty of Versailles did not cover the payment of debts owing by German nationals to American nationals out of funds seized by the Alien Property Custodian, and that consequently the provision for the payment of interest did not apply to them. This view, we think, is clearly erroneous, as will appear from a reading of the relevant provisions of the Treaty of Versailles.

Subdivision (2) of paragraph (*h*) of Article 297 (Section IV) provides as follows (the omitted portion dealing with the obligation of Germany to restore property to the owners thereof—italics ours):

> "(2) As regards Powers not adopting Section III and the Annex thereto, * * * *the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power* shall be subject to disposal by such Power in accordance with its laws and regulations and *may be applied in payment of the claims and debts defined by* this Article or *paragraph 4 of the Annex hereto.*"

Sub-division 4 of the Annex to Section IV is as follows (italics ours):

> "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place *with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests*, including companies and associations in which they are interested, in German territory, *or debts owing to them by German nationals*, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war."

These provisions establish not only that the "property, rights and interest and the cash assets of German nationals received by an Allied or Associated Power" shall be subject to disposal by such Power in accordance with its laws and regulations, but also that they "may be applied in payment of the claims and debts defined in Paragraph 4 of

the Annex to Article 297". Paragraph 4 of the Annex to Article 297 specifically provides that *among the claims to which the seized property may be applied by a Power which does not join in the establishment of an International Clearing Office* (or, as expressed in the Treaty, "as regards Powers not adopting Section III and the Annex thereto") *are debts owing to nationals of that Allied or Associated Power by German Nationals.*

It being thus clearly provided that Section IV deals with the payment (out of seized property) of debts owing by German nationals to nationals of an Allied or Associated Power which has not joined in the establishment of an International Clearing Office, we shall examine it to see whether it contains any provisions with respect to the amount in which such debts shall be allowed.

Subdivision 14 of the Annex to Section IV of Part X provides as follows (italics ours):

> "The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, *apply to debts, credits and accounts, Section III regulating only the method of payment.*
>
> "In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, *the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless* the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

The United States has not made a declaration adopting Section III, but on the other hand it has given no notice rejecting the provisions of Section III respecting the currency in which payment of debts is to be made and the rate of exchange and the rate of interest. *To that extent,* therefore, Section III of Part X (devoted primarily to the provisions relating to International Clearing Offices) is operative in cases where the United States, out of funds seized by the Alien Property Custodian, pays debts owing by German to American nationals, and we must look to the substantive provisions therein contained.

Since it appears from the portions of the Treaty of Versailles which we have quoted that the substantive provisions of Section III of Part X, so far as they relate to the currency in which payment is to be made, the rate of exchange and the rate of interest, apply to the payment of debts owing by German nationals to the nationals of an Allied or Associated Power out of property of German nationals seized by an Allied or Associated Power, we shall next examine these provisions of Section III to determine what they provide with respect to the payment of interest during the war.

On the question of the allowance of interest Subdivision 22 of the Annex to Section III provides as follows:

> "The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.
>
> "Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor."

The effect of these provisions is that Germany in the Treaty of Versailles concedes as a right, privilege and advantage to the citizens of any Allied or Associated Power, that in the payment of debts owing by German nationals to the nationals of that Allied or Associated Power, whether (*a*) through the International Clearing Office or (*b*) through the application to such payment of property seized by the Allied or Associated Power, *interest shall be allowed for the period of the war.*

In adopting Part X of the Treaty of Versailles as a part of the separate Treaty of Peace between the United States and Germany (*supra*, p. 28), we think it is clear beyond the realm of argument that it was the intention of the President and of the Senate *to assure to the United States and to its nationals the same rights, so far as expressed in Part X, which the United States and its nationals would have had if the Treaty of Versailles had itself been ratified by the Senate.*

If the Treaty of Versailles had been ratified by the Senate, the United States would have had the right within one month thereafter to join with Germany in the establishment of an International Clearing Office. In that event unquestionably debts proved through the International Clearing Office owing by German nationals to American citizens would have been allowed with interest for the whole period of the war (Treaty of Versailles, Subdivision 22 of the Annex to Section III of Part X, *supra*, p. 33).

If the United States did not desire to join in the establishment of an International Clearing Office, it was, by the Treaty of Versailles, expressly permitted to retain the property seized by it and to apply the same to the payment of debts owing to American citizens by German

nationals (Treaty of Versailles, Subdivision (2) of Paragraph (*h*) of Article 297, and Paragraph 4 of the Annex to Article 297, *supra*, p. 31); and it was specifically provided that in the settlement of matters provided for in Article 297 between "Germany and the Allied or Associated States * * * and between their respective nationals the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply" (Treaty of Versailles, Subdivision 14 of the Annex to Section IV of Part X, *supra*, p. 32).

The Treaty of Versailles was drafted by men of different languages to settle all the divers affairs of the world dislocated by four years of shock; its English version is in parts, perhaps, not a model of style, and some of its provisions may appear awkward and obscure. On the other hand, of this we may be certain, that with the crowd of matters which required adjustment, no vain word is spoken in the Treaty. Each clause was intended to have meaning and effect.

The clauses which we have quoted can have, we submit, only a single meaning, the meaning which we have attributed to them, and which they quite clearly express. And this, moreover, is supported by the history of events which are still so recent that they are fresh in memory. That there was a strong sentiment in the United States against the relinquishment of property seized by the Alien Property Custodian is evidenced by Section 5 of the joint resolution of Congress which declared the peace almost three years after the Armistice (42 Stat. L. 105). It could scarcely be stronger at the time of the formulation of the Treaty of Versailles, and it certainly was not weaker at that time. To release seized property to be dealt

with by an International Clearing Office was so contrary to the feeling prevailing in the United States that the American delegates to the Peace Conference necessarily had to insist upon a provision allowing any country to retain the seized property and itself administer it. In doing so, however, they had equally to insist that American creditors should be given the same rights as they would have were the property administered by an International Clearing Office. The provisions which we have quoted were obviously inserted with that purpose and effect. They have become the law of the land through their incorporation into the Treaty of Peace between the United States and Germany (*supra*, p. 28). That this is so is established, we think, beyond question by the authorities.

Authorities.

Art. VI of the Constitution of the United States reads in part as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is well established by judicial decision that a treaty duly made under the authority of the United States is as much a part of the law of the United States as an act of Congress or the Constitution itself.

Ware v. *Hylton*, 3 Dall. (U. S.) 199;
In re Parrott, 1 Fed. 481;
Chae Chan Ping v. *U. S.*, 130 U. S. 581;
***Whitney* v. *Robertson*, 124 U. S. 190;**

In re Ah Lung, 18 Fed. 28;
Bartram v. *Robertson,* 15 Fed. 212;
Blythe v. *Hinckley,* 173 U. S. 501, 508;
Hauenstein v. *Lynham,* 100 U. S. 483.

During the debate in the House of Representatives on the Jay Treaty, Chief Justice Ellsworth in a written opinion communicated to Jonathan Trumbull on March 13, 1796, said:

> "The instant the President and Senate have made a treaty the Constitution makes it a law of the land; and of course all persons and bodies in whatsoever station or department, within the jurisdiction of the United States, are bound to conform their actions and proceedings to it. Such a treaty *ipso facto* repeals all existing laws, so far as they interfere with it." (Manuscript letters to Washington CXVII, 287; cited by Crandall,—"Treaties, their Making and Enforcement", pp. 115, 116.)

There have been some enlightening cases involving private rights decided under the provisions of Article IV of the Definitive Treaty of Peace between the United States and Great Britain concluded at Paris September 3, 1783, which article reads as follows (italics ours):

> "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of *the full value in sterling money,* of all *bona fide* debts heretofore contracted." (Malloy "Treaties, Conventions, International Acts, Protocols & Agreements between the United States of America and other powers, 1776-1909", Vol. 1, p. 586.)

The leading case under this article of the treaty is the case of *Ware* v. *Hylton* (1796), 3 Dallas 199, in which the question before the court was, as stated

by Mr. Justice CHASE at page 234, "whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?"

After quoting from the sixth article of the Constitution, which provides "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding", Mr. Justice CHASE proceeds as follows at page 238 (italics ours):

> "I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That

British debts, to a great amount, had been paid into some of the state treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the states; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the states, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the states, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the states, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases, compelled the receipt of property instead of gold and silver."

and further at pages 240-241:

"I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order, as it stands:

* * * * *

3d. "Shall meet with no lawful impediment", that is, with no obstacle (or bar) arising from the common law, or acts of parliament, or acts of congress, or acts of any of the states, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts as the treaty contem-

plated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied by the removal of one impediment, and leaving another; and *a fortiori*, by taking away the less and leaving the greater. These words have both a retrospective and future aspect.

4th. "To the recovery", that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. *"In the full value in sterling money", that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain.* This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the state where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the states made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these

words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation."

Other cases holding to the same effect are:

State of Georgia v. *Brailsford*, 3 Dall. 1;
Ogden v. *Blackledge*, 2 Cranch 272;
Hopkirk v. *Bell*, 3 Cranch 454, 4 Cranch 164;
Higginson v. *Mein*, 4 Cranch 415;
Jones v. *Walker* (opinion by JAY, *C. J.*, not dated), 2 Paine 688;
Page v. *Pendleton*, 1 Wythe's Repts. (Va.) 211, 217;
Hamilton & Co. v. *Eaton*, 1 Hughes 249;
Hylton's Lessee v. *Brown*, 1 Wash. C. C. 298 and 343;
Dunlop & Wilson v. *Alexander's Admin.*, 1 Cranch C. C. 498;
McNair v. *Ragland, et al.*, 16 N. C. 520, 526.

POINT II.

There is no error in the decree below on the question of the rate of exchange.

(A)

General Discussion.

Whether the amount of a debt owing by a German to an American before the Great War was expressed in dollars or in marks was usually a matter of accident. Such a debt necessarily arose out of an actual transaction involving real values, that is, the value of what was involved compared

with other values, and this was expressed in a medium of exchange, *i. e.*, money, of one country or another; and since both Germany and the United States at that time were operating their monetary systems on an actual gold standard, the relations between their respective currencies were relatively stable, affected before the United States entered the war only to a comparatively small and gradual extent by the fact that the blockade of Germany by the Allies made gold shipments to the United States impossible, thus permitting a fall of exchange below the pre-war gold shipment point.

The contention of the Alien Property Custodian is that if an indebtedness from a German to an American happened to be expressed in *dollars*, the amount now recoverable is measured in dollars, but that if that indebtedness had happened to be expressed in German *marks*, then, in substance, *nothing* can be recovered, although the respective values involved in the two transactions were precisely the same.

The fundamental error of the Alien Property Custodian is that instead of regarding the debt as a debt, he assumes that a debt from A to B expressed in marks means that A has so many marks in his possession which belong to B, and that a suit to recover upon the debt is in the nature of an action of replevin to recover the specific marks which B owns but which are in A's possession.

If the true nature of the transaction be regarded, that is, that the debt arises out of a transaction involving real values, the often grotesque and always unjust and discriminatory results of the contention of the Alien Property Custodian are immediately dissipated.

In order that we may not seem to claim too much, let us say that we appreciate fully that a govern-

ment has an inherent right to make *fiat* money, and may declare that a medium of exchange, even though, by inflation, the same amount of units of the same formal name no longer represent any actual value but the merest scintilla of the value represented by the same number of units of the same name in which the debt was originally expressed, must be taken in payment of the debt,—that being the familiar doctrine of legal tender. But such a law, as to legal tender, can have no extra-territorial effect, and the mere fact that Germany printed tons of paper which it called marks, and which it declared, as between its subjects, and in Germany, must be taken as equivalent in value to an equal number of gold marks, cannot affect the judgment of this Court in a suit in equity instituted under the provisions of an Act of Congress.

Two other considerations show the futility and injustice of the Alien Property Custodian's contention:

1. Since the date of the judgment in this case, Germany has gone back to an actual gold basis, and the ordinary medium of exchange in its business is gold marks. Is it the Alien Property Custodian's contention, and can such a contention be sustained, that an indebtedness expressed in marks on December 31, 1916, upon which a judgment was entered on July 17, 1923, is payable at the rate of one *cent* for each *25,000* marks (Record, fol. 67), while if the judgment had been delayed for three or four months judgment would have been entered at the rate of one *dollar* for each *4.2* marks?

2. At the time of the trial the mark was worth 2/1000 of a cent, and on the date of the decree it was worth 1/25000 of a cent. The Government

openly contends that the delay of the Court in reaching the decision reduces the value of the plaintiffs' claim by 5000%, that is, it makes the plaintiffs' claim worth 1/50 of what it was on the date of trial. Moreover, this action was begun on December 5, 1921 (R. 4), and was brought to trial as quickly as possible, and yet it is common knowledge that in 1921 the German mark, instead of being worth a minute fraction of a cent, was still expressed in terms of cents. The Government contends that the amount to be recovered upon the admitted debt, which was based upon actual value, depends not upon the value involved in the transaction, but upon the state of the court calendars in the district in which the action is instituted by reason of the place of residence of the plaintiffs.

On the one hand, it is possible under the doctrine of the Alien Property Custodian, that by delaying the judgment until after the reform of the German currency the amount to be recovered by an American against a German may be actually *greater* in value than the true value which the debt represents; and on the other hand, it is the result of this contention that delay in reaching a case for trial or in deciding a case (provided that fortune decrees that the delay is not *so* long as to reach the first result) may not only reduce that value, but that the amount of the reduction may vary with the actual period of this uncontrollable delay.

All of this results from the erroneous conception of the Alien Property Custodian in considering that a debt means that the debtor has in his possession specific units of money which the creditor is entitled to recover from him, as if in an action of replevin. It may also be that the Alien Property Custodian erroneously assumes that a legal tender act is extra-territorial in effect.

There are now many authoritative decisions by courts of last resort in this country and in England which refute the contentions of the Alien Property Custodian and sustain the conclusion of the District Judge and the Circuit Court of Appeals. Before citing these authorities and quoting from them nothing remains except a short comment upon the statute under which this suit is brought.

(B)

The Trading with the Enemy Act.

Section 9 of the Trading with the Enemy Act (Act of June 5, 1920, ch. 241, 41 Stat. L. 977), so far as material (we have quoted sub-division (*a*) in full, *supra*, at p. 8), reads as follows:

> "(*a*) That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled; * * * If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may at any

time, before the expiration of thirty months after the end of the war institute a suit in equity * * * to establish the * * * debt so claimed, and if so established, the Court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the Court shall determine said claimant is entitled:

"(e) * * * nor in any event shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917."

It will be observed that the claimant himself must have been the owner of the debt on October 6th, 1917; and consequently, the debt recoverable under Section 9 of the Trading with the Enemy Act must be a pre-war debt.

Notice of that debt could have been given to the Alien Property Custodian, and its payment ordered by the President upon application therefor, or ordered by the United States District Court upon suit being brought, long before the termination of the war.

It is respectfully submitted that all implications from these provisions of law favor the allowance of a debt expressed in marks at the pre-war rate of exchange.

In the first place, and most obviously, it is the pre-war debt that can be recovered; and that pre-war debt must necessarily be measured in dollars, because marks could not be paid by the Alien Property Custodian on the order of the President or on the order of the Court.

Secondly, the plain implication of the statute is

that the debt does not vary in amount, certainly not after October 6th, 1917.

We concede, of course, that the statute must be read in the light of co-existing and collateral provisions of law, whether statute law or common law; but in the absence of any statute law or common law requiring a different conclusion, we submit that the correct inference from the provisions of the Trading with the Enemy Act is that the value of pre-war debts recoverable under that Act is to be taken as of their pre-war value; and that any other conclusion would cause confusion and lack of uniformity in the application of its provisions.

We think that it would be not only a misconstruction but a distortion of this statute, under which the suit was brought, to hold that the amount of the debt recoverable thereunder was variable, dependent upon the adventitious date of judgment. Indeed, if that was the construction to be given to the statute it would nullify the portion which permitted the President to order a payment of the debt without a judgment.

The following quotation from an English case, dealing with the rule at common law, is even more applicable, it seems to us, upon the question of statutory construction:

Lebeaupin v. *Crispin* [1920] 2 K. B. 714, by McCardie, *J.*, at page 722:

> "To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the Court, and partly on whether the judge reserved his deci-

sion or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory."

(C)

The Authorities at Common Law.

In view of the fact that courts of last resort in many jurisdictions have now firmly established the rule announced by the District Judge in this case, which avoids the unjust results reached by that for which the Alien Property Custodian contends, it is unnecessary to discuss the divergent earlier authorities, and we shall present to the Court those which have now settled the rule in important jurisdictions of the United States and England.

United States Courts.

The question has, we believe, been settled by this Court in the case of *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317. In order fully to appreciate the opinion rendered by Mr. Justice HOLMES it is necessary to consult the opinion of the Court of Appeals below.

Birge-Forbes Co. v. *Heye,* 248 Fed. 636, by BATTS, *C. J.*, at page 640:

> "One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial; the former being 23.8 cents, and the later 18⅛cents. The purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evi-

> dence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value."

The case was taken to this Court by certiorari, and was affirmed (251 U. S. 317), the Court saying by Mr. Justice HOLMES at page 325 (italics ours):

> "We see no error in the finding that Section 477 of the German Civil Code did not bar the claim. * * * The same is true with regard to the taking the *value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments.* On the whole case our conclusion is that the judgment should be affirmed."

The principle, of course, is the same. Whether the depreciation is from 18¼ cents per mark to 1/25000 of a cent, or from 23.8 cents to 18⅛ cents makes no difference in the principle to be applied. This Court has ruled, therefore, that the value should be taken as of the date when the debt was due.

Other federal courts of high authority have reached the same conclusion.

Wormser Bros. v. *F. Marroquin & Co.*, 249 Fed. 428;
Page v. *Levenson*, 281 Fed. 555;
Dante v. *Miniggio*, 298 Fed. 845.

New York State.

The Court of Appeals in New York has in unmistakable terms settled the law in that State.

Hoppe v. *Russo-Asiatic Bank*, 235 N. Y. 37, in

which a *Per Curiam* opinion was rendered, as follows:

> "Held: In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for breach of contract, or for a tort, where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied. (*Gross* v. *Mendel*, 171 App. Div. 237; affd., 225 N. Y. 633.)"

This is a final settlement of the rule by the Court of Appeals after a consideration of the many New York cases which had previously dealt with the situation. (*Gross* v. *Mendel*, 171 App. Div. 237, affd. 225 N. Y. 633; *Pavenstedt* v. *N. Y. Life Ins. Co.*, 203 N. Y. 91; *Guaranty Trust Co.* v. *Meer*, 114 Misc. 327; *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App. Div. 16; *Sirie* v. *Godfrey*, 196 App. Div. 529.)

In the light of the full discussion afforded by the opinions in these various cases dealing with various phases of the rate of exchange problem, the Court of Appeals was able to announce a general rule, thus harmonizing all the decisions and overruling to the extent necessary all expressions of courts of lower jurisdiction inconsistent therewith.

Courts of Last Resort of Other States.

Simonoff v. *Granite City National Bank*, 279 Ill. 248, by CARTWRIGHT, *J.*, at page 255:

> "Presentment having been waived, the plaintiff was entitled to receive at the time of the waiver, in the currency of this country, the

market value of 7700 francs. That amount was then due and he was entitled to recover interest from that date. The value of the 7700 francs in the currency of this country depended on the rate of exchange at the time he became entitled to such value, and he was not required to accept the value of 7700 francs more than a year afterward, when they had depreciated in the markets of this country."

Katcher v. *American Express Company,* 94 N. J. L. 165: In this case a contract between the parties was construed as requiring the defendant to forward a specific number of Russian rubles to a designated payee and to return them to the sender if delivery could not be made. The defendant neither delivered the rubles nor returned them, and an action was brought for damages.

By PARKER, *J.,* at page 171:

"It is plain that under the circumstances of the case plaintiff is entitled to recover in some action the value of 1,000 rubles remaining undelivered in defendant's hands as of the time when, in the usual course and with reasonable diligence, defendant should have ascertained and notified plaintiff that delivery had failed and was impracticable by the course of the mail."

English Cases.

The House of Lords finally settled the doctrine (which, by the way, had been theretofore expressed with substantial unanimity by the lower courts) in *S. S. Celia* v. *S. S. Volturno* [1921] 2 A. C. 544, argued before Lords Buckmaster, Sumner, Parmoor, Wrenbury and Carson, a decision concurred in by four of the learned Lords, Lord Carson being

the only one filing a dissenting opinion. We quote from the leading opinion, and from one of the concurring opinions as follows:

By LORD BUCKMASTER at pages 547-549:

"There are only two possible dates put forward as the dates upon which the conversion can be made, the date when the loss was incurred and the date when the liability for the loss was determined. The suggestion that it might be the date of the writ was incapable of being supported and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

"It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred, and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment.

"To my mind that is not the true function and purpose of the judgment. A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date.

"As was stated by Wright, *J.*, in the case of *Joyner* v. *Weeks* (1891), 2 Q. B. 31, 33: 'Many

cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed.'

"And as an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause.

"Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account."

By LORD PARMOOR at page 561:

"In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract".

Counsel for the Alien Property Custodian insist that the case decided by the House of Lords involved the rate of exchange applicable in cases of tort, and not in cases of contract; but the reasoning of the opinions *deduced the rule applicable in cases of tort from the rule deemed applicable in cases of*

contract. Whatever slight divergences from this rule may have occurred in the English cases prior to the decision in *S. S. Celia* v. *Volturno, supra,* the decisions made by the English courts subsequent thereto give a uniform application to the rule announced in that case.

British American Continental Bank, Ld., in re Goldzicher and Penso's Claim [1922] 2 Ch. 575, by P. O. LAWRENCE, *J.*, at pp. 581, 583:

> "The liquidator contends that as the applicants' claim is one for damages for breach of contract, and as the amount of such damages was fixed once for all when the breach was committed, the correct date for the conversion of the claim from Belgian currency into English currency is the date of the breach. In support of this contention the liquidator relies upon the recent cases of *Di Ferdinando* v. *Simon* [1920] 2 K. B. 704; *Barry* v. *Van den Hurk* [1920] 2 K. B. 709; *Beboupen* v. *Crispin* [1920] 2 K. B. 714; *S. S. 'Celia' (Owners)* v. *S. S. 'Volturno' (Owners)* [1921] 2 A. C. 544. * * *
>
> "The amount of damages, whenever assessed by this Court (even though for administration purposes that amount is stated to be due on some date other than the date on which the Court makes the actual assessment) must, according to the authorities cited, always be based on the loss sustained at the date of the breach of the contract, and is therefore fixed once for all on that date, which date, therefore, in my judgment, is the correct date on which a claim such as the applicants' ought to be converted into English currency for the purpose of ascertaining the amount for which the applicants ought to be admitted as creditors in a winding-up".

An appeal was taken to the Court of Appeal, and the judgment of the High Court of Justice was

affirmed, WARRINGTON, *L. J.*, saying at [1922] 2 Ch. 587:

> "* * * the amount of those damages would have to be ascertained by the application of the rules of law applicable to damages arising from breach of contract. That is now settled by the decision in *S. S. Celia* v. *S. S. Volturno* [1921] 2 A. C. 544. It is true that in that case the claim arose in tort and not in contract, but it is quite clear from the speeches delivered by the members of the House of Lords that the rule in contract and in tort is the same. That rule is that, in translating damages from a foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract".

British-American Continental Bank, Ld., In re: Credit-Generale Liegeois' Claim [1922] 2 Ch. 589: The applicants, who were Belgian bankers carrying on business in Brussels, on January 10, 1921, received notice that an English bank with whom they had a current account, had gone into liquidation. They thereupon closed the account and struck a balance showing that the account of the English bank was overdrawn to the extent of 150,396 francs (Belgian currency). On January 25, 1921, an order was made for the compulsory winding up of the English bank. On the claim of the applicants in the winding-up, the question arose whether the amount, which was admittedly due to them, should be calculated, for the purpose of conversion into English currency, at the rate of exchange prevailing on January 10, 1921, when the account was closed, or on January 25, 1921, the date of the winding up order. If the proper date for the conversion was January 25, 1921, the Belgian bank would gain considerably by the difference in the

rate of exchange. *Held*, that the amount of the overdraft, being a debt, ought to be converted into English currency at the date when the debt was incurred, and not at the date of the winding-up order or at the date of the judgment in an action, if one had been brought. The fact that the claim was made in the winding-up, and not by way of an action for debt, made no difference in the application of the foregoing principle.

By P. O. LAWRENCE, *J.*, at page 593:

> "In my opinion the question which has arisen falls to be determined in the present proceeding as if this Court were sitting on January 25, 1921, and were then trying an action brought by the applicants against the bank for the recovery of their debt (see *Goldzieher & Penso's Claim* (*Ante*, p. 575). Therefore, if the correct date for conversion is the date when the debt became due in Belgium, this Court ought now to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,396 francs taken at the rate of exchange prevailing on January 10, 1921. If, on the other hand, the correct date for conversion is the date when, for the first time, it became necessary for the applicants or the Court to express the debt in English currency, then this Court ought to hold that the amount due from the bank to the applicants on Jan. 25, 1921, is such a sum of English money as is equivalent to 150,396 francs taken at the rate of exchange prevailing on January 25, 1921, this date, in a winding-up taking the place of a judgment in an action. * * *
>
> "On the assumption that my decision in *Goldzieher and Penso's Claim* (*Ante*, p. 575) is right, I am of opinion that the question which I have to determine is concluded in

the liquidator's favor by authorities which are binding on me. I had arrived at this opinion during the hearing of the case, and held it with some confidence until my attention was drawn to the observations made by Atkin, *L. J.* at the end of his judgment in *Societe des Hotels le Touquet Paris-Plage* v. *Cumming* [1922], 1 K. B. 451, 465. I confess that those observations have caused me to distrust my opinion, and have raised a suspicion in my mind that there may be some fallacy underlying the conclusions which I have drawn from the authorities. Nevertheless, further reflection and a further study of those authorities have confirmed me in my opinion, the reasons for arriving at which I will now proceed to state. It is now finally settled by the decision in the House of Lords in *S. S. Celia* v. *S. S. Volturno* [1921], 2 A. C. 544, that in an action brought in England either for breach of contract or for tort, where the damage is fixed and is due to conditions determined at a particular date, but has to be assessed in a foreign country in foreign currency, the date for conversion into English money is the date when the breach or the tort was committed, and not the date when the judgment of the Court was pronounced. The principle affirmed by this decision, in my opinion, applies to an action brought in England for the recovery of a debt payable in a foreign currency, as the amount of the debt, for the purpose of being expressed in the judgment in English money, must be converted into English currency according to the rate of exchange prevailing between the two countries; and this mode of computation, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for (*i. e.*, the foreign currency) at the appointed time and place; consequently the date for conversion is the date of breach and not the date of the

judgment; see the judgment of Vaughan Williams, *L. J.* in *Manners* v. *Pearson & Son* [1898], 1 Ch. 581, 592. This view of the learned Lord Justice was based to a large extent upon the decision in *Scott* v. *Bevan*, 2 B. & Ad. 78, which has been so fully commented upon recently in the Court of Appeal in *Di Ferdinando* v. *Simon* [1920], 2 K. B. 704 [1920], 3 K. B. 409, that I need not say more about it here than that there the plaintiff was seeking to recover in an English Court a judgment debt payable to him in the Island of Jamaica in the currency of that island, and that it was held that the date for conversion was the date of the judgment in Jamaica."

The following are notes published in the English weekly law journals of two cases on the question of the rate of exchange in fixing damages.

Uliendahl v. *Pankhurst Wright & Co.*, K. B. Div., July 6, 1923, 39 Times L. R., 628; 67 S. J. 791; 1923 W. N. 224. This action, brought by a German to recover price of goods sold and delivered to defendant in England, raised a question as to the date at which exchange should be calculated in case of nonpayment by the purchasers. Action was brought for 76,885.25 marks. Defense failed and judgment was given for the plaintiff. The question then arose at what rate of exchange 76,885.25 marks should be converted into sterling.

ROWLATT, *J.*, at page 628,

"felt that the weight of authority was clearly in favour of the view that the rate of exchange to be taken was that prevailing when the debt became payable, and not that prevailing when the action was tried. The judgment of Mr. Justice Acton in *Cohn* v. *Boulken* (*supra*, 36 T. L. R. 767) appeared to be based on a miscon-

ception of the effect of *Scott* v. *Bevan* (2 B. & Ad. 78) and was, he thought, erroneous. In actual practice, the theory that the rate of exchange prevailing at the date of the judgment was that which must be taken would lead to great inconvenience. Clearly it was not so in a case of tort or of damages for breach of contract, and he did not see why it should be so in a case of debt. It would be most inconvenient if not only the dilatoriness of the parties in getting their action tried, but the accidents of the state of business in the Courts should affect the rate of exchange. He would point out that the phrase 'the rate prevailing at the date of the judgment' should really be 'the rate prevailing at the date of the verdict'; to-day verdict and judgment usually come together, but in the old practice judgment did not come until the first day of the term following that in which a verdict was obtained, and it was the verdict that was the important matter. There must be judgment at the rate of exchange prevailing when the debt became due —namely, for £313."

Peyrae v. *Wilkinson and another*, K. B. Div., Oct. 26, 1923, 156 Law Times 341: Action tried before BAILHACHE, *J.*, sitting without a jury. The plaintiff, who carried on business at Lyons, France, brought an action against the defendants to recover the balance of the price of goods sold and delivered by him to the defendants. The agreement for the sale of the goods was made in October, 1921, and the price specified was 10,630 francs subject to certain allowances. The learned judge held that the goods ought to have been paid for on the 10th December, 1921. The defendants paid on account £50 on the 7th April, 1922, an amount which represented, at the rate of 48 francs to a pound, 2,400 francs. The present action was brought to recover

the balance, viz., 8,017 francs. The question for decision was whether, in converting that sum into English currency, the rate of exchange current when payment should have been made for the goods, namely, the 10th December, 1921, should prevail, or whether the rate of exchange should be taken as at the date of the judgmennt. The value of the franc had depreciated considerably between those dates.

Held, that the debt must be converted at the rate of exchange current at the date the debt became due and payable.

(D)

The Effect of the Treaty Provisions.

If it should be held that under the common law plaintiffs' right would be limited to recovery of the value of the marks on the date of judgment, then, we submit, it is entirely clear that a new right in plaintiffs' favor was created by the Treaty of Peace between the United States and Germany, entitling plaintiffs to recover these marks at the average rate prevailing for one month prior to the declaration of war, which is at the rate of 17½ cents per mark (Record, p. 9), and which is no less than the amount of the judgment actually rendered.

In connection with the discussion of the right to recover interest for the period of the war upon a claim which is to be paid by the Alien Property Custodian out of funds of a German seized by him, we have quoted the sections of the Treaty of Peace with Germany, and of the Treaty of Versailles which demonstrate, we submit, that in such actions interest is to be allowed, and payment is to be made *in a currency at a rate of exchange* as specified in the Treaty of Versailles. We need not repeat the

argument or the citation of the sections of the Treaties which support it. We shall quote only the section of the Treaty of Versailles which deals with the question of the currency and rate of exchange (Subdivision (*d*) of Article 296 in Section III of Part X—italics ours):

> "(*d*) Debts shall be paid or credited in the currency of such one of the Allied or Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. *If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.*
>
> "For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany."

Conclusion.

The Decrees of the District Court and of the Circuit Court of Appeals, in so far as they failed to allow interest on the claim from April 6, 1917, to April 14, 1919, should be reversed, and in all other respects should be affirmed.

Respectfully submitted,

ALEXANDER B. SIEGEL,
Attorney for Benjamin Guinness *et al.*

not be guaranteed by the States of which those territories form part;

(*c*) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor;

(*d*) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation);

(*e*) The provisions of this Article and of the Annex hereto shall not apply as between Germany on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Germany by the Government of such Allied or Associated Power or of such Dominion or of India as the case may be;

(*f*) The Allied and Associated Powers who have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and German nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

ANNEX.

1.

Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, paragraph (*e*), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing

Office in their respective districts, except that all transactions with the Clearing Office in the Opposing State must be effected through the central Clearing Office.

2.

In this Annex the pecuniary obligations referred to in the first paragraph of Article 296 are described "as enemy debts," the persons from whom the same are due as "enemy debtors," the persons to whom they are due as "enemy creditors," the Clearing Office in the country of the creditor is called the "Creditor Clearing Office," and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office."

3.

The High Contracting Parties will subject contraventions of paragraph (*a*) of Article 296 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

4.

The Government guarantee specified in paragraph (*b*) of Article 296 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication

of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

5.

Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will, in due course, inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case, the Debtor Clearing Office will give the grounds for the nonadmission of debt.

6.

When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

7.

The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the Creditor Clearing Office notice has been given by the Debtor Clearing Office that it is not admitted.

8.

When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

9.

The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses, or commissions.

10.

Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, in-

terest at 5 per cent on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claim shall have been disallowed or the debt paid.

Each Clearing Office shall, in so far as it is concerned, take steps to collect the fines above provided for, and will be responsible if such fines can not be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

11.

The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

12.

To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

13.

Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

14.

In conformity with Article 296, paragraph (*b*), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid.

15.

Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.

16.

Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

17.

Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

18.

Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to reopen and maintain a claim abandoned by the same.

19.

The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the information and documents in their possession, so as to enable

the Tribunal to decide rapidly on the cases which are brought before it.

20.

Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit.

A fee of 5 per cent of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

21.

With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned.

Each of the Clearing Offices will be at liberty to correspond with the other and to forward documents in its own language.

22.

Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent per annum except in cases where, by contract, law, or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.

23.

Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 296, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

24.

The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

25.

In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

Section IV.

PROPERTY, RIGHTS, AND INTERESTS.

Article 297.

The question of private property, rights, and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

(*a*) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights, and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights,

and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

(*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

(*c*) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (*b*) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(*d*) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the An-

nex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(*c*) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

(*f*) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (*e*) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or bur-

dens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph can not be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (*e*) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights, or interests of which he was deprived.

Through restitution in accordance with this Article the price or the amount of compensation fixed by the application of paragraph (*e*) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(*g*) The rights conferred by paragraph (*f*) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights, or interests were not applied before the signature of the Armistice.

(*h*) Except in cases where, by application of paragraph (*f*), restitutions in specie have been made, the net proceeds of sales of enemy property, rights, or interests, wherever situated, carried out either by virtue of war legislation or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash

assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favor of Germany resulting therefrom shall be dealt with as provided in Article 243.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures

taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(*i*) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States.

(*j*) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights, and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights, or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners.

ARTICLE 298.

Germany undertakes, with regard to the property, rights, and interests, including companies and associations in which they were interested, restored to nationals of Allied and Associated Powers in accordance with the provisions of Article 297, paragraph (*a*) or (*f*):

(*a*) to restore and maintain, except as expressly provided in the present Treaty, the property, rights, and interests of the nationals of Allied or Associated Powers in the legal position obtaining in respect of the property, rights, and interests of German nationals under the laws in force before the war;

3.

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4.

All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may

be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights, and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

5.

Notwithstanding the provisions of Article 297, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trade-marks in third countries to the exclusion of the German company, and these unique means of reproduction shall be

belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

12.

All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

13.

Within one month from the coming into force of the present Treaty, or on demand at any time, Germany will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within German territory, and which concern the property, rights, and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

14.

The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

15.

The provisions of Article 297 and this Annex apply to industrial, literary, and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies, or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (*b*).